STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 11,182
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the termination of her A.N.F.C. benefits. The issue is whether the petitioner is an "eligible parent" of "eligible children" for A.N.F.C. within the meaning of the pertinent regulations.

FINDINGS OF FACT

The petitioner is the mother of two children. She and the father of the children are separated and are in the process of obtaining a divorce. The petitioner resides in central Vermont. The petitioner's husband lives in southern New Hampshire.

The petitioner and her husband entered into a stipulation whereby they have "joint custody" of the children. The stipulation, which was the basis of a Temporary Order entered by the Family Court on March 31, 1992, provides that the petitioner and her husband "have joint and shared legal and physical rights and responsibility for their children", and that "the children shall reside with the (father) every week from Monday afternoon to Friday afternoon . . . and with the (petitioner) at all other times". Neither party pays child support to the other.

Both children are enrolled in an early learning program (the older child being in an accredited kindergarten class) located in the town where the petitioner's husband resides. The petitioner's husband is responsible for taking the children to school and picking them up. He often joins them at school for lunch. If the school needs to contact the children's parents, it is the petitioner's husband whom they would call. During the week the petitioner, herself, attends college some distance from her home, and stays in a dormitory room. On weekends she picks up the children and brings them to her home.

Except for the children's school attendance, the petitioner and her husband have nearly equal time with them, both quantitatively and qualitatively. Both maintain full "homes" for the children with separate rooms, clothes, furniture, and toys. The children spend four nights a week (Monday through Thursday) at their father's home and three nights a week at the petitioner's home. They spend about thirty-two hours a week in school. Outside of school they are with their father another sixty-three hours, and with the petitioner seventy-three hours.

The stipulation setting forth the above schedule is to remain in effect only until the end of the children's school year--mid June, 1992. The petitioner and her husband are still negotiating what will be their arrangement for the summer and beyond.[1]

ORDER

The Department's decision is affirmed.

REASONS

W.A.M. ə 2242.2 defines an "eligible parent" for A.N.F.C. as "an individual who . . . lives in the same household with one or more eligible . . . children." W.A.M. ə 2302.1 includes the following provision regarding "residence":

> Federal and State law (section 406 of the Social Security Act; 33 VSA 2701 and 2702) require that, to be eligible for public assistance (ANFC), a dependent child shall be living with a relative in a residence maintained as a home by such relative(s), unless the child is committed by a Juvenile Court to the care and custody of the Commissioner of Social Welfare and placed in foster care (ANFC-FC).
>
> A relative may apply and be found eligible to receive ANFC on behalf of a child who is not yet in the home; receipt of such assistance shall be conditioned on the child's coming to live with the relative within 30 days after receipt of the first payment.

"Home" is defined by W.A.M. ə 2302.12 as follows:

> A "home" is defined as the family setting maintained, or in process of being established, in which the relative assumes responsibility for care and supervision of the child(ren). However, lack of a physical home (i.e. customary family setting), as in the case of a homeless family is not by itself a basis for disqualification (denial or termination) from eligibility for assistance.
>
> The child(ren) and relative normally share the same household. A "home" shall be considered to exist, however, as long as the relative is responsible for care and control of the child(ren) during temporary absence of either from the customary family setting.

In cases of joint custody the board has held (and the Vermont Supreme Court has affirmed) that it is the parent that provides the primary "home" for the children who is

eligible for A.N.F.C. Fair Hearing No. 5553; Aff'd, Munro-Dorsey v. D.S.W., 144 Vt. 614 (1984). The board has also held that in an otherwise-equal or near-equal joint custody situation the parent with whom the children reside while they are attending school should be considered to be providing the "primary home" for these children. Fair Hearing No. 9521.

In Fair Hearing No. 9521, the board noted that a state education statute (16 V.S.A. э 1075) provides that the "legal residence" of a student is where his parent or legal guardian resides. In that case, the child of the petitioner who was seeking A.N.F.C. went to school in the district where the petitioner resided--and not in the district where the child's father resided. The board held:

> Absent evidence to the contrary, consistency dictates that the child's primary home for A.N.F.C. purposes should be that of the petitioner.

The facts of the instant case are nearly identical to Fair Hearing No. 9521, except that here the children go to school in the district of the parent who is not seeking A.N.F.C. Although the petitioner herein shares nearly equally the time and responsibility for the care and support of the children,[2] there is no other area of parenting in which the petitioner "predominates" enough to "compensate" for the matter of school attendance in determining that the children's "primary home", at least for the time being, is with their father.[3] The fact that the father has not

applied for A.N.F.C. benefits for himself does not alter the above analysis.[4] See Fair Hearing No. 10,732.

For this reason the Department's decision in this matter is affirmed. 3 V.S.A. ə 3091(d) and Fair Hearing Rule No. 19.

FOOTNOTES

[1]It was emphasized to the petitioner at the hearing, and is repeated now, that this conclusion is only effective for the time in which the children remain in the present joint custody situation. If any change occurs, the petitioner should reapply for A.N.F.C., and the Department must make a new determination based on any changes in circumstances. The petitioner also has the right to appeal any subsequent decision by the Department.

[2]It can be noted, however, that 15 V.S.A. ə 657 provides that in joint custody situations it is the parent who keeps the children "overnight" the greater period of time who is considered the "custodial parent" in determining the payment of a "maintenance supplement" from one parent to the other. In the instant case, it is the petitioner's husband, who has the children overnight at his home four nights a week, that would be the "custodial parent" under this provision.

[3]The petitioner argued that because during the times that the children are not actually in school she spends more time with them than does her husband (seventy-three hours per week compared to sixty-three hours for her husband), she should be considered the primary caregiver. This argument was raised (by the Department!) in Fair Hearing No. 9521, but was implicitly rejected by the board because it was clear in that case, as it is here, that the parent with whom the child resides on school days is the one providing the primary "care and support" to the child while the child is in school.

[4]It can be argued, however, that the petitioner herein is being victimized for the sake of consistency. In the previous joint-custody A.N.F.C. cases it has considered, the board has expressly held that the "primary-home parent" is the only parent eligible for A.N.F.C. Fair Hearing Nos. 5553 (p. 5) and 9521 (p. 5). In those cases the "primary-home parent" was found eligible for a full monthly A.N.F.C. grant. Neither "non-primary-home parent" in those cases was

applying for or receiving A.N.F.C. The petitioner herein is the first "non-primary-home parent" having joint custody to bring an appeal to the board.

Although federal regulations prohibit the payment of entire-month A.N.F.C. grants to more than one household on behalf of any eligible child (45 C.F.R. ə 233.90(c)(2)), it is not clear whether federal regulations would prohibit the Department from "prorating" A.N.F.C. benefits between two parents' households according to the number of days each month that each parent having "joint custody" actually has the child in his or her "home". (See, e.g., W.A.M. ə 2226.1.) The hearing officer recognizes that this would result in a reduction in the amount of benefits currently being paid to "primary-home parents"--including the victorious petitioners in Fair Hearing No.'s 5553 and 9521. Therefore, he cannot recommend that the board attempt to impose such a change in current "policy".

However, back in 1983 when Fair Hearing No. 5553 was decided, the board urged the Department to consider amending its regulations to better accommodate needy children whose parents have or are seeking joint custody. It appears that the Department may now be considering some changes in this area. "Proration", if permissible under federal regulations, would appear to be consistent with the aims and spirit of "joint custody" (see 15 V.S.A. ə 666); and it would not work such a harsh result on parents, like the petitioner herein, who despite providing nearly-equal support and care for their children in a joint custody arrangement, are ineligible for any A.N.F.C. benefits once it is determined that they are not the "primary-home parent".

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